UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	)	
	)	
v.	)	**CRIMINAL NO. 95-04-P-H**
	)	
ARMONDO COLE,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255

The defendant, Armondo Cole, moves this court to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. On August 25, 1995, this Court sentenced Cole to 360 months incarceration based on convictions for conspiracy to possess with intent to distribute in excess of 50 grams of cocaine base; possession with intent to distribute in excess of 50 grams of cocaine base; and various sentence enhancements, including prior felony drug convictions. (Judgment, Docket No. 69.) Having reviewed each of the grounds asserted in Cole's motion and supporting memorandum, I am satisfied that Cole is not entitled to any relief and I therefore recommend that the motion be **DENIED.**

BACKGROUND

On January 18, 1995, Cole and three other individuals were indicted in a two-count indictment (Docket No. 8) for conspiracy to possess with intent to distribute in excess of 50 grams of cocaine base in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) & 846 and illegal possession of in excess of 50 grams of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) & 841(b)(1)(A). On February 10, 1985, Cole's co-defendants filed motions to suppress both

physical evidence seized from a motor vehicle in which Cole was a passenger and statements they made during a traffic stop and/or while in police custody. (Docket Nos. 20 & 25). On the same date, Cole filed a motion to suppress statements he made, alleging a violation of his Fifth Amendment right not to be compelled to be a witness against himself. (Docket No. 23). The one-page motion did not recite any facts or indicate the nature of the alleged Miranda violation. On March 8, 1995, Cole withdrew his motion during the suppression hearing.[1] (March 8, 1995 Sentencing Transcript at 140-41; Docket No. 23.) The circumstances surrounding the withdrawal of the motion suggest that the motion was narrowly targeted at statements given by Cole during a roadside traffic stop when Cole was handcuffed and "detained" prior to being arrested.[2] (March 8, 1995 Sentencing Transcript at 140-41.) After a break in the hearing, the Assistant United States Attorney addressed the Court as follows: "I understand from Mr. Vincent that he does not disagree that the statements that Armondo Cole made to John Bryfonski at Troop G Substation are admissible against him, that they were given after proper Miranda warnings were given."[3] (Id.) The AUSA indicated that the Government had no intention of offering statements made during the traffic stop and that, based on this assurance, Cole's counsel had indicated that he was willing to withdraw Cole's motion. The Court inquired whether Cole's counsel had discussed the matter with Cole. (Id. at 141.) Cole's counsel indicated he had, but took a moment to confer again with Cole on the matter. After this brief conference, Cole's

[1] In its opposition memorandum, the Government directs the Court's attention to the Suppression Court's statement on March 9, 1995 that Cole's motion "is no longer pressed," (Opposition Memorandum at 4, citing March 9, 1995 Suppression Transcript at 336.) The Government wants the Court to draw an inference of waiver from the absence of any objection by Cole or his attorney following this statement, citing United States v. Mitchell, 85 F.3d 800, 807 (1st Cir. 1996). (Id.) I cannot draw this inference from this part of the record because the record indicates that Cole and his counsel were not present at the hearing on March 9. (Id. at 231.)

[2] Cross-examination of the arresting officer conducted by Cole's counsel at the suppression hearing supports this narrow construction of the motion because the cross-examination focused on events occurring during the traffic stop. (March 8, 1995 Suppression Transcript at 115-131.)

[3] This differs from the instant contention that the government violated Cole's right to have counsel present during a custodial interrogation and not to be questioned after requesting to remain silent.

counsel informed the Court that Cole agreed and that the "motion to suppress is now moot." (Id. at 142.)

Of the alleged conspirators, Cole and one other, Cory Israel, went to trial. As a result of an order granting Israel's motion to sever (Docket No. 26), Cole and the co-defendant were tried simultaneously before separate juries, one for each co-defendant, commencing April 26, 1995. Following the suppression hearing but prior to trial, Cole's court-appointed attorney withdrew and retained counsel entered his appearance. (Docket No. 53). At the conclusion of a two-day trial, Cole's jury found him guilty of both counts in the indictment. (Docket No. 56). According to his motion, Cole did not testify at trial. After representing Cole at the sentencing hearing and filing a notice of appeal (Docket No. 66), retained counsel withdrew from the case and a direct appeal ensued with court appointed counsel. On January 21, 1997, the Appeals Court issued a mandate affirming the judgment. (Docket No. 92). United States v. Cole, 1996 WL 688276 (1st Cir. December 2, 1996) (unpublished opinion). According to the mandate, the only issue raised by Cole on appeal was the sufficiency of the evidence used to convict him. Id. Cole petitioned the Supreme Court for a writ of certiorari, which the Supreme Court denied on October 4, 1999. United States v. Cole, 528 U.S. 843 (1999).

Exactly one year later, the instant motion arrived in this court. (Docket No. 94). It consists of a seven-page form motion signed under the statutory alternative to the oath. (Docket No. 94). Cole filed at the same time a motion for leave to file a late memorandum in support of his motion. (Docket No. 95). By endorsement dated October 27, 2000, Magistrate Judge Cohen ordered that Cole should promptly advise the Court how much additional time he needed to file his memorandum. When Cole failed to respond to that Order, the Magistrate Judge ordered on November 27, 2000, that Cole had until December 20, 2000 to file a supporting memorandum.

Cole did not respond. As a result of the Court's prior Order to Answer (Docket No. 97), the Government filed its response to Cole's original motion on January 10, 2001. (Docket No. 99). On March 20, 2001, Cole filed a motion to extend his filing deadline to respond to the government's response. (Docket No. 100.) I granted the motion and extended the deadline until May 30, 2001. On June 4, 2001, the Court received a mailing from Cole's "jailhouse attorney," Charles E. Brookshire, a/k/a Edwin C. Fortes, Jr., containing a supporting memorandum of law. The memorandum is not signed by Cole, but Mr. Brookshire, who prepared it on Cole's behalf, requests that I forward it to Cole for signing. Although the filing is unsigned and untimely, I have considered the arguments contained therein, including a new basis for the motion premised on Apprendi v. New Jersey, 530 U.S. 466 (2000).

Cole raises, in sum, five grounds for relief. As ground one, he alleges that the convictions were obtained as a result of a coerced confession. As ground two, he alleges that his convictions were obtained through the fruits of an illegal arrest, search, and seizure. As ground three, he argues that his conviction was the result of "a grand or petit jury, which was unconstitutionally selected and impaneled." This claim breaks down into two parts: (1) a claim that the indictment failed to include a charge of aiding and abetting pursuant to 18 U.S.C. § 2, which constituted a fatal variance between the indictment and the proof at trial; and (2) a claim that the procedure followed by the trial court, conducting two trials simultaneously, was improper and "greatly" prejudicial. As ground four, Cole asserts that each of his three lawyers, motion counsel, trial counsel, and appellate counsel, deprived him of effective assistance and that the Court impermissibly denied him counsel of his choice for trial. He further complains, without any additional elaboration, that none of these grounds were previously raised because of the ineffective assistance of each of his attorneys and because "just recently did the U.S.

Supreme Court deliver rulings that now give the underlying issues that are being presented herein a firm constitutional status." As his fifth ground for relief, Cole argues that his sentence and convictions are unlawful because the grand jury did not find probable cause and the petit jury did not find beyond a reasonable doubt that he was in possession of 50 grams or more of cocaine base, which finding forms a basis for his conviction and sentence. (Supporting Memorandum of Law at 9.)

DISCUSSION

A section 2255 motion may be denied without an evidentiary hearing where the petition itself, any accompanying exhibits, and the record evidence, "plainly [reveal] . . . that the movant is not entitled to relief." Rule 4(b), Rules Governing Section 2255 Proceedings; see also Barrett v. United States, 965 F.2d 1184, 1186 (1st Cir. 1992). As to each of the five claims made by Defendant, there is plainly no basis for relief.

1. Fifth Amendment—use of coerced statements

Cole alleges that state and federal law enforcement officers "fired" questions at him despite his repeated requests to consult with an attorney and remain silent. He asserts that as a result of this conduct a coerced confession was used to convict him.

Failure to raise an issue either at trial or on direct appeal bars a collateral attack of a conviction unless the movant can demonstrate "cause" excusing the default and "actual prejudice." United States v. Frady, 456 U.S. 152, 167-68 (1982) (concerning non-constitutional, erroneous jury instruction ground for relief); see also Wainwright v. Sykes, 433 U.S. 72, 87 (1977) (applying cause and prejudice standard in § 2254 collateral attack where petitioner failed to object at trial to the trial court's admission of his allegedly involuntary confession); Knight v. United States, 37 F.3d 769, 774 (1st Cir. 1994) (observing that cause and prejudice standard

applies to collateral attacks grounded on constitutional violations not raised on direct appeal from conviction, other than ineffective assistance of counsel). Cole seeks to establish cause through a claim of ineffective assistance. However, Cole's conferral with his counsel at the suppression hearing concerning the withdrawal of his motion to suppress does weigh against his ability to show cause for his default. Cole was present at the suppression hearing on March 8, 1995, when his motion to suppress was discussed on the record and he heard his attorney say that the motion was being withdrawn. Given these circumstances, I cannot conclude that Cole has provided an adequate basis for this Court to conclude that there was cause for his failure to pursue this issue at trial or on direct appeal. In any event, even if Cole's ineffective assistance of counsel ground for relief is construed to establish the cause element of his failure to appropriately raise this issue, Cole has not presented facts that would support a finding of actual prejudice because he has not indicated what the substantive content of his statements was or that the record is devoid of facts that could support the conviction in the absence of these undisclosed statements. Without some evaluation of the other evidence against him, there is no basis for this Court to make a finding of prejudice. Because there is no basis for finding cause or prejudice, ground one of Cole's motion may be rejected without a hearing.

2. Fourth Amendment—use of evidence seized in an illegal search

This claim, like the Fifth Amendment claim, fails because it was not raised at trial or on appeal. Again, Cole fails to develop any facts to support the cause and actual prejudice standard he would have to meet in order to obtain relief on collateral review. Even more unfortunate for Cole, the record involving this claim does provide affirmative evidence that he suffered no actual prejudice because of the admission of the physical evidence seized from the motor vehicle. The Court heard and denied co-defendant Thomas's motion to suppress the physical evidence seized

from the car based upon three different independent grounds. In addition to the reasons given when denying Thomas's motion, in Cole's case there would have been a substantial standing issue that he, as a passenger in the vehicle, would have had to overcome. See Rakas v. Illinois, 439 U.S. 128, 148-49 (1979). Nothing in Cole's § 2255 motion raises the slightest doubt about the merits of the prior ruling and, therefore, ground two should be rejected without a hearing.

3. Variance between indictment and trial evidence & prejudice from use of simultaneous juries

Cole's third ground contains two sub-parts, both asserting non-constitutional[4] errors. When a defendant raises a non-constitutional error for the first time on collateral review the threshold showing must be significant. "Such claims are properly brought under § 2255 only if the claimed error is 'a fundamental defect which inherently results in a complete miscarriage of justice' or 'an omission inconsistent with the rudimentary demands of fair procedure.'" Knight, 37 F.3d at 772 (quoting Hill v. United States, 368 U.S. 424, 428 (1962)). Cole has not presented facts to support the sort of exceptional circumstances that might cause the Court to consider these claims for the first time on collateral review.

Cole complains that because the jury was allowed to consider his culpability pursuant to the aider and abettor statute, 18 U.S.C. § 2, there was a fatal variance between the indictment and the proof at trial because the language of the indictment did not reference § 2. He is wrong. The First Circuit has made clear that § 2 does not need to be pleaded in an indictment. United States v. Sabatino, 943 F.2d 94, 99-100 (1st Cir. 1991) ("It is important to emphasize that an aider and

[4] At least Cole does not characterize either of the issues as having constitutional dimension. The conclusion that the aider and abettor statute, 18 U.S.C. § 2 is implicitly included in all substantive offenses without being specifically plead is a matter of statutory construction. See United States v. Sabatino, 943 F.2d 94, 99-100 (1st Cir. 1991). The use of separate juries to hear evidence against defendants simultaneously does not work any constitutional deprivation. See United States v. Lebron-Gonzalez, 816 F.2d 823 (1st Cir. 1987).

abettor charge is implicit in all indictments for substantive offenses, so it need not be specifically pleaded for an aiding and abetting conviction to be returned.")

Likewise, the device of impaneling two separate juries to hear evidence at the same time is not "unheard of in federal jurisprudence," as Cole alleges. In fact, it is an accepted practice. United States v. Lebron-Gonzalez, 816 F.2d 823, 830-831 (1st Cir. 1987) (collecting cases). Because Cole has not shown that any exceptional circumstances exist to cause this Court to entertain these claims on collateral review, these challenges do not provide any basis upon which to grant the motion.

4. Sixth Amendment—ineffective assistance of counsel

Cole suggests that the three attorneys, two court appointed and one retained, and an inmate paralegal who have represented him during the trial and appellate proceedings all violated his Sixth Amendment right to effective assistance of counsel in various unspecified ways. Presumably, Cole intends to incorporate the four issues raised in his first three grounds into this ineffective assistance ground. He does not assert any additional facts or issues under this claim. Claims of ineffective assistance of counsel are properly before the Court pursuant to 28 U.S.C. § 2255 and, although the claims are constitutional in nature, they are not subject to the cause and prejudice standard. Knight, 37 F.3d at 773. Rather, claims of ineffective assistance of counsel are subject to the familiar two-prong standard set forth in Strickland v. Washington, 466 U.S. 668, 669 (1984). To prevail on this claim, Cole must show, first, that his counsels' performance fell below a standard of objective reasonableness and, second, that but for that inadequate performance, the outcome of the proceedings would have been different. Id.

Cole's first complaint is leveled at his court appointed attorney, Joel Vincent, Esq., who handled his case until one month prior to the trial. The allegations pertaining to Vincent must

relate to the omission of the alleged Fourth and Fifth Amendment violations. As to the alleged Fourth Amendment violations, the record and the trial judge's rulings on the co-defendant's motion to suppress physical evidence speak for themselves. Counsel does not fall below the requisite standard of performance when he fails to press futile or frivolous motions. United States v. Hart, 933 F.2d 80, 83 (1st Cir. 1991). The Fifth Amendment claim is somewhat harder to address because of Cole's own failure to clarify what statements were admitted against him at trial. If he is referring to a conversation between himself and a co-defendant in the back seat of the police cruiser, the Court addressed the non-custodial nature of those statements when ruling on a co-defendant's motion to suppress. (Suppression Hearing Tr. at 332). The transcript of the trial itself makes clear that other statements made by Cole were before the jury. (See, e.g., Trial Transcript Vol. III, at 474.) Whether these statements are the ones referenced by this motion is unknown. However, given Cole's apparent waiver of any suppression issues related to statements made by him, I see no basis for concluding that either Napolitano or Vincent was deficient in any issue related to the suppression of statements. Likewise the attorney appointed to handle the direct appeal of this case was not deficient in failing to raise any of these issues on appeal as there was no basis for appeal under any of these grounds.

Cole also complains that the Court violated the Sixth Amendment by not permitting him to replace trial counsel with alternative retained counsel "on the first day of trial." According to Cole, he was "coerced by the Court to continue with" counsel he did not desire. Cole does not brief this issue in his supporting memorandum of law. Because this issue was not raised on direct appeal, Cole must meet the cause and prejudice standard. Cole fails to make any showing regarding either and, accordingly, cannot succeed on this ground.

5. Apprendi

Cole contends that his conviction and sentence are unlawful because the specific drug amounts on which they are based were not submitted to either the grand or petit jury. In Apprendi, the Supreme Court considered the question of "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." 530 U.S. at 469. The Court held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. Thus, if a judicial determination of drug quantity or weight by a preponderance of the evidence standard results in the imposition of a term of imprisonment in excess of the default statutory maximum sentence (i.e., the maximum sentence for trafficking in an unspecified weight or quantity of the drug at issue), an Apprendi violation will have occurred. See United States v. Robinson, 241 F.3d 115, 119 (1st Cir. 2001) (describing United States v. Nordby, 225 F.3d 1053 (9th Cir. 2000)). But:

> It is now settled in this and other circuits that even though an indictment is silent as to drug amount and the jury is not asked to make a specific drug-quantity determination, no Apprendi violation occurs as long as the defendant receives a sentence below the default statutory maximum applicable to the kind of drugs at issue. This holds true even if the length of the sentence has been significantly increased by facts (such as drug amount) that have been found by the sentencing court under a preponderance-of-the-evidence standard.

United States v. Duarte, 246 F.3d 56 (1st Cir. 2001) (citing Robinson, 241 F.3d at 119). Pursuant to 21 U.S.C. § 841(b)(1)(C), "If any person [trafficks in cocaine base] after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years . . . ." 21 U.S.C. § 841(b)(1)(C). The defendant in

this case had two prior felony drug convictions. (Undisputed Findings Affecting Sentence, Docket No. 64.) Thus, the default statutory maximum sentence he was subject to was a 30-year term of imprisonment. See United States v. Terry, 240 F.3d 65, 72-73 (1st Cir. 2001). Cole was sentenced to a term of 360 months, a sentence equal to the default statutory maximum. Although the foregoing quote from Duarte suggests that the sentence imposed must be *below* the default statutory maximum sentence, in fact, the Supreme Court in Apprendi prohibited only the imposition of a sentence, based on preponderance findings by the sentencing judge, with a duration *"beyond* the prescribed statutory maximum." 530 U.S. at 490. Because Cole's sentence does not exceed the statutory maximum, his sentence does not violate Apprendi.

CONCLUSION

Based upon the foregoing, I recommend that Defendant's Motion to Vacate pursuant to 28 U.S.C. § 2255 be **DENIED** without an evidentiary hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten days of being served with a copy thereof. A responsive memorandum shall be filed within ten days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated: June 26, 2001

_____
Margaret J. Kravchuk
U.S. Magistrate Judge

U.S. District Court
District of Maine (Portland)

CRIMINAL DOCKET FOR CASE #: 95-CR-4-ALL

USA v. COLE Filed: 01/18/95

Other Dkt # 2:95-m -00001

Other Dkt # 2:94-m -00049

Other Dkt # 2:94-m -00048

Case Assigned to: JUDGE D. BROCK HORNBY

ARMONDO JOHNTEL COLE (1) ROBERT M. NAPOLITANO

defendant [term 08/25/95]

[term 08/25/95] 774-4109

[COR LD NTC ret]

765 CONGRESS STREET, PORTLAND, ME 04102

JOEL VINCENT, ESQ.

[term 04/04/95]

[COR LD NTC cja]

VINCENT & KANTZ, 80 EXCHANGE STREET, SUITE 32

PORTLAND, ME 04101-6630

761-1914

ARMONDO JOHNTEL COLE

[COR LD NTC pse] [PRO SE]

Reg. No. 03394-036

MARION USP, P.O. BOX 2000, RT 5

MARION, IL 62959

Pending Counts:

NONE

Terminated Counts: Disposition

21:841E=ND.F NARCOTICS-SELL, Imprisonment for a term of 360

DISTRIBUTE, OR DISPENSE months on counts one and two

Conspiracy with Cocaine to be served concurrently.

(1) Remanded to U.S. Marshall. Supervised release for a term

of 10 years. Special assessment of $100.

(1)

21:841B=NP.F NARCOTICS- Imprisonment for a term of 360

POSSESSION Cocaine months on counts one and two to be served concurrently.

Remanded to U.S. Marshall. Supervised release for a term

of 10 years. Special assessment of $100.

(2)

Offense Level (disposition): 4

Complaints Disposition

CT I: possession w/intent to distribute in excess of 50 grams of cocaine base, 21:841(a)(1); CT II: conspiracy to possess w/intent to distribute in excess of 50 grams of cocaine base, 21:841(a)(1)

[2:94-m -48]

CORY ISRAEL (2) JOHN E. GEARY

defendant [term 04/28/95]

[term 05/03/95] [COR LD NTC cja]

PO BOX 6129,FALMOUTH, ME 04105

878-9020

Pending Counts:

NONE

Terminated Counts: Disposition

21:841E=ND.F NARCOTICS-SELL, DISTRIBUTE, OR DISPENSE Conspiracy with Cocaine (1) Judgment of Discharge for the reason that the Jury has returned its verdict finding the defendant not guilty

21:841B=NP.F NARCOTICS - POSSESSION Cocaine (2) Judgment of Discharge for the reason that the Jury has returned its verdict finding the defendant not guilty

(2)

Offense Level (disposition): 4

Complaints Disposition

CT I: possession w/intent to distribute in excess of 50 grams of cocaine base, 21:841(a)(1); CT II: conspiracy to possess w/intent to distribute in excess of 50 grams of cocaine base, 21:841(a)(1)

[2:94-m -48]

KARLA SCHOOLS (3) JAMES R. BUSHELL, ESQ.

defendant [term 07/11/95]

[term 07/11/95] [COR LD NTC cja]

P. O. BOX 7485, PORTLAND, ME 04112

871-0036

PAULA HOUSE MCFAUL, ESQ.

[term 01/27/95]

[COR LD NTC cja]
148 MIDDLE STREET, P.O. BOX 271,PORTLAND, ME 04112
207-772-0010

Pending Counts:
NONE

Terminated Counts: Disposition

21:841E=ND.F NARCOTICS-SELL, DISMISSED
DISTRIBUTE, OR DISPENSE (1)
Conspiracy with Cocaine
(1)

Offense Level (disposition): 4

Complaints Disposition conspiracy to possess with intent to distribute in excess of 50 grams of cocaine base, 21:841(a)(1)
[2:94-m -49]

JERMAINE THOMAS (4) WILLIAM MASELLI, ESQ.
aka [term 10/03/95]
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defendant
[term 10/03/95] DEBORAH L. POTTER, ESQ.
[term 10/03/95]
[COR cja]
PO BOX 7005,LEWISTON, ME 04243-7005
207/784-6323

Pending Counts:
NONE

Terminated Counts: Disposition

21:841E=ND.F NARCOTICS-SELL, 126 months of incarceration;
DISTRIBUTE, OR DISPENSE Remanded to USM; 5 years
Conspiracy with Cocaine supervised release; $50.00 special assessment; due immediately; fines waived; restitution is n/a
(1)

21:841B=NP.F NARCOTICS - POSSESSION Cocaine (2)
Dismissed
(2)

Offense Level (disposition): 4

Complaints Disposition

COUNT I: possession with intent to distribute in excess of 50 grams of cocaine base, 21:841(a)(1);

COUNT II: conspiracy to possess with intent to distribute in excess of 50 grams of cocaine base, 21:841(a)(1)

[2:95-m -1]

U. S. Attorneys:

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